

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Stephen William Comiskey,

Debtor.

Case No. 04-31649 GFK
Chapter 7

In re:

Robert Sebastian,

Plaintiff,

vs.

Adv. Proc. No. 04-_____

Stephen William Comiskey,

Defendant.

COMPLAINT

For his Complaint against Defendant Stephen William Comiskey (“Comiskey”), Plaintiff Robert Sebastian (“Sebastian”) states and alleges as follows:

I. Parties

1. Sebastian is an individual and resident of the State of Minnesota, with a domicile at 8450 11th Avenue South in Bloomington, Minnesota, 55420. Sebastian owns 50% of all outstanding shares of Finish Line Cleaning, Inc., a Minnesota corporation (“Finish Line”) and is its Secretary and co-President.

2. Comiskey is an individual and resident of the State of Minnesota, with a domicile at 13104 Longview Drive in Burnsville, Minnesota, 55337. Comiskey owns 50% of all outstanding shares of Finish Line and is its Treasurer and co-President. Comiskey is the debtor

in the above-referenced Chapter 7 proceeding having filed a voluntary Petition under Chapter 7 of Title 11 on March 18, 2004. The case is now pending in this Court.

3. This adversary proceeding is commenced under 11 U.S.C. § 523(a)(4), Bankruptcy Rules 4007 and 7001, et seq. at the Federal Rules of Bankruptcy Procedure and applicable local rules. Sebastian seeks a determination that certain indebtedness of Comiskey to Sebastian is nondischargeable. The Court has jurisdiction over this action under 28 U.S.C. § 1334, 157(a) and 157(b)(1). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A)(i)(o).

II. Facts

4. In or around October 1997, Sebastian and Comiskey joined together in a carpet and upholstery cleaning business, which they called Finish Line Cleaning.

5. On or around September 15, 1999, Sebastian and Comiskey incorporated Finish Line. Sebastian was named Secretary and co-President and Comiskey was named Treasurer and co-President of the Company. Sebastian and Comiskey were and are the only members of Finish Line's board of directors.

6. For a period of time after incorporation, Sebastian and Comiskey amicably operated Finish Line together.

7. In or around April of 1999, Comiskey's wife, Donni Jo Comiskey ("Donni Jo"), joined the company as a receptionist and bookkeeper.

8. At some point after Donni Jo was employed, Comiskey began to oversee payroll, accounts receivable and accounts payable and refused to relinquish any control or discretion over these matters to Sebastian.

9. Initially, Donni Jo drew a salary of approximately \$26,000 per year. Over time, her salary greatly increased. Upon information and belief, at one point, she was earning over \$60,000 per year.

10. Comiskey's salary also greatly increased, upon information and belief, growing in amounts incommensurate with the growth of the Company.

11. In or about late-1999, Comiskey and the Company's accountant, Betty Allen, decided to register the Company as a "restoration company" with the State of Minnesota for the purposes of avoiding payment of state sales tax. This decision was made without the knowledge, input, or advice of Sebastian. At the same time, Comiskey directed Sebastian to stop collecting sales tax on Company revenues, which he did based upon the advice he received from Comiskey and Betty Allen (through Comiskey).

12. Comiskey, without the knowledge or consent of Sebastian, acquired at least two credit lines in the name of the Company using Sebastian's social security number and Sebastian's personal credit history. Sebastian has been forced to pay approximately \$10,000 of indebtedness due to American Express on one of these credit lines.

13. The disagreements between the parties over operation of the Company became so extreme that, since approximately early-2002, each party has operated a separate carpet and furniture cleaning venture that calls itself Finish Line Cleaning or some derivation thereof. The corporate entity Finish Line has not been dissolved and remains a going concern for some or all aspects of each party's operation.

14. At the time that the parties decided to operate independently, without Sebastian's knowledge or approval and without any negotiation, Comiskey unilaterally divided up the Company's customer list, taking contact information for certain customers. Comiskey has

refused to share revenues achieved by continued work for customers on the joint customer list, including large amounts of warranty work done for the company Room and Board.

15. Upon information and belief, Comiskey has failed to make payments for other indebtedness created by his separate operation of Finish Line Cleaning, requiring Sebastian to make such payments or damaging Sebastian's credit.

16. For example, Comiskey took possession of and continues to use a Company-owned van in his operation, but has refused to make payments on the loan for it that Sebastian guaranteed personally, thereby causing damage to both Sebastian's credit and the Company.

17. Sebastian has learned that, from 2000 through 2002, the Company failed to withhold social security and Medicare taxes from Sebastian's, Comiskey's and Donni Jo's paychecks and/or failed to pay those taxes, resulting in an overall \$94,061.79 of unpaid liability to the federal government. Of this amount, only \$9,760.06 is allocated to Sebastian's income. \$23,188.82 is allocated to Comiskey's income, and \$61,112.91 is allocated to Donni Jo's income.

18. Sebastian learned in the fall of 2003 that the State of Minnesota was investigating the Company for non-payment of sales tax for the years 2000 through 2002. The Company's failure to remit such tax, based upon the decision of Comiskey and the professional advice of Betty Allen, has resulted in the personal assessment by the Department of Revenue of such taxes against Sebastian.

19. Since the inception of the business, Comiskey has paid for personal items, distributions and services with corporate funds by drafting checks off a Finish Line checking account or by charging them to company credit lines. On information and belief Comiskey has not reimbursed the Company for any or all of these payments.

COUNT I

20. Plaintiff restates and realleges Paragraphs 1-19 as if set forth fully in this Paragraph.

21. As a corporate officer, member of the board of directors for the Company, and controlling shareholder in a closely held corporation, Comiskey owes duties of loyalty and care to Sebastian, as a shareholder and to the Company.

22. Comiskey has breached these duties, by among other things:

- a. Drawing an excessive salary;
- b. Paying Donni Jo an excessive salary;
- c. Using the Company's accounts and credit lines to pay for personal items, services and distributions in an amount as yet undetermined;
- d. Failing to adequately supervise payroll and accounting practices and to ensure withholding of all necessary federal payroll taxes for the years 2000, 2001 and 2002, and withholding and remittance of state sales tax;
- e. Usurping advertising rights and advantages belonging to the Company for personal benefit or for the benefit of a business entity owned by Comiskey; and
- f. Failing to account for property, profits or benefits derived by Comiskey's use of Company property, including his use of the Company name and logo.

22. Comiskey's actions as set forth above constitute fraud or defalcation while acting in a fiduciary capacity. Pursuant to 11 U.S.C. § 523(a)(4), the debt owed by Comiskey to Sebastian is one for fraud or defalcation while acting in a fiduciary capacity and is therefore nondischargeable.

23. Pursuant to 11 U.S.C. § 523(a)(4), the debt owed by Comiskey to Sebastian arises out of larceny and/or embezzlement by Comiskey and is therefore nondischargeable.

WHEREFORE, Plaintiff Sebastian requests the judgment of this Court as follows:

- a. Determining the amount of indebtedness owned by Comiskey by Sebastian resulting from the conduct alleged herein;
- b. Determining that the debt owed by Comiskey to Sebastian is nondischargeable under 11 U.S.C. § 523(a)(4) as arising from Comiskey's defalcation, fraud, larceny or embezzlement;
- c. Granting Plaintiff his costs and attorneys fees herein;
- d. Granting such other and further relief as the Court seems just and equitable.

Dated: June 21, 2004.



Larry B. Ricke (#121800)
David R. Crosby (#237693)

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Counsel for Plaintiff Robert Sebastian

VERIFICATION

Robert Sebastian, Plaintiff named in this Complaint, declares under penalty of perjury that the facts alleged therein are true and correct according to the best of my knowledge, information and belief.

Dated: June 21, 2004.

A handwritten signature in cursive script that reads "Robert A. Sebastian". The signature is written in dark ink and is positioned above a horizontal line.

Robert Sebastian